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Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

No. 01-1749

In The

Supreme Court of the United States

October Term, 2001

MICHAEL J. MARKOWSKI AND JOSEPH F. RICCIO,
Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The District of Columbia

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Petitioners Reply to Brief in Opposition

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TABLE OF AUTHORITIES

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ARGUMENT

I. PURPOSE OF PETITIONERS REPLY

The purpose of this Reply is two fold. First, to clarify the difference between the Question presented by Petitioners ad the Question as worded by the Respondent S.E.C. Second, to clarify that neither the Court of Appeals opinion nor the S.E.C. decision was predicated upon a finding of non-disclosure. The basis of both rulings was artificially high bids.

II. PETITIONERS QUESTION BASED UPON EXPRESS RULING OF DISTRICT OF COLUMBIA

The cardinal difference between the Petitioner's request for certiorari and the Respondent S.E.C.'s Brief in Opposition centers upon the express basis for the Court of Appeals for the District of Columbia's ruling. The Questions Presented by Petitioners were directly predicated upon the pronouncement of the opinion:

> ... Whatever the practical concerns, we cannot find the Commission's interpretation to be unreasonable in light of what appears to be Congress's determination that "manipulation" can be illegal solely because of the actor's purpose.

S.E.C., 274 F.3d 525 (D.C. Cir. 2001) (App. C-5)

The first Question Presented by Petitioners stated:

> Whether the ruling manipulation can be illegal solely because of the actor's purpose conflicts with decisions by this Court requiring, among other matters, scienter and deception that are in accord with determinations by Congress.

Petition for Certiorari, p. i.

In contrast to the District of Columbia's opinion and the Question Presented by Petitioner, the S.E.C. would frame the question:

> Whether securities transactions that are made with the undisclosed intent to maintain the market price at an artificially high level and thereby to create the false appearance of genuine investor demand are proscribed by Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5.

Brief in Opposition, p. i.

The Mountaintop bids, however, were

acknowledged by the District of Columbia to be real in all respects, real trades, real sales, real prices, and real customers. *Michael J. Markowski and Joseph P. Riccio v. S.E.C.*, 274 F.3d 525, 528. (App. C- 4) The concept that the bids were non-bona fide was entirely predicated upon the stock being manipulated. The arguments of the S.E.C. below to the District of Columbia claimed that the stock was manipulated because the bids were artificial. Thus, the Question Presented, as phrased by the S.E.C., relies upon the assumption of "artificially high" bids resulting in self-proving charges of manipulation and non-bona fide bids that Petitioners must disprove. This is the reason for Petitioner's second Question Presented:

> Whether the ruling that manipulation can be found based solely on the subjective determination of the actor's intent effectively transfers the burden of proof for manipulation and for non-bona fide bids to Petitioners who must disprove any wrongdoing.

Petition for Certiorari, p. i.

Respondent's Brief in Opposition expressly stated that the second Question Presented by Petitioner should be ignored because:

> Petitioners do not address that question elsewhere in the petition. Nor did

> they raise that issue either before the Commission or in the court of appeals, and that court's decision did not address the question. The issue is thus not properly before the court.

Respondent's Brief in Opposition, p. 8, at FN 3.

With all due respect, the issue was extensively argued in the Petition for Writ of Certiorari as well as to the National Adjudicatory Council of NASD, the Securities and Exchange Commission, and to the United States Court of Appeals for the District of Columbia Circuit.

As stated in the Petition:

> Petitioners argued to the Court of Appeals that the S.E.C. ruling relied upon a circular thesis that the bids were non-bona fide because the stock was manipulated and that the stock was manipulated because the bids were non-bona fide. This merry-go-round resulted in reciprocating self-proving charges that had the effect of placing the burden on Petitioners to disprove both charges.

Petition for Certiorari, p. 7; *see also id* at pp. 7, 11, 15, 19- 20.

III. RULING OF BELOW BASED UPON "ARTIFICIALLY HIGH" BIDS, NOT NON-DISCLOSURE

The S.E.C.'s case on manipulation is completely dependent upon the assumption that the bids were "artificial," yet it fails to delineate an adequate method for defining, measuring, and/or determining "artificially high" prices. The express basis for the S.E.C. ruling proclaims:

> We have found that the bids for Mountaintop were published with the manipulative purpose of keeping Mountaintop prices at an artificially high level. We accordingly sustain NASD's findings of violation.

Decision and Order of the Securities and Exchange Commission, September 7, 2000. (App. A-6).

There was no direct evidence that the bids were "artificial" or "artificially high". Mere allegations of non-bona fide bids cannot be used as the basis to prove that the stock was manipulated. The term "artificial" is catchy, but must be defined and accompanied by a finding of the "non-artificial" price:

> Forcing security prices to an artificial level has intuitive appeal because creation of artificial prices, unlike trading, is socially

> undesirable. For this formulation to be operational, however, **one must be able to define the difference between an artificial and non-artificial price.** This task turns out to be much more difficult than it might at first appear....

Daniel R. Fischel and David J. Ross, *Should the Law Prohibit "Manipulation" in Financial Market?*, 105 Harvard Law Review 503, 508 (1991)(emphasis added).

Both the S.E.C. and the Court of Appeals for the District of Columbia acknowledge that the traditional bases for finding bids to be non-bona fide are not present, and the S.E.C. does not claim hindsight as a valid legal standard for determining whether bids were too high; yet, in reality, this is the standard used. Without a valid legal standard in which to measure "artificially high bids", the ruling upholds an assertion of manipulation based upon the assumption that bids resulting in real sales to real customers at real prices were "artificial".

Respondent's Brief in Opposition now attempts for the *first time* to argue non-disclosure:

> ... petitioner did not reveal to investors that they were buying up Mountaintop at high prices even though there was no retail demand for the securities and that they purchased the securities solely

in order prop to up the price.

See Brief in Opposition, p. 13.

The non-disclosure argument in the Respondent's Brief in Opposition is not based on any finding of non-disclosure expressed in the District of Columbia Circuit's opinion, or in the ruling of the S.E.C. (App. A, B, and C). The S.E.C. counsel apparently assumes their nondisclosure argument should be implied from their "artificially high" bids argument.

Petitioners did not make the disclosure now demanded by the S.E.C. in it's Brief in Opposition because it is not correct. Global had believed Mountaintop would become a viable company. Inventory was often flat and large sales were made to large institutional accounts. Global's trading in Mountaintop securities paralleled the NASDAQ index. The bid/ask price for Mountaintop was disclosed, the trading volume was disclosed. Global was recording real trades which did deceive anyone about the level of activity. The fully disclosed conduct of Global was not deceptive. As required under NASD regulations, it was disclosed that Global was the dominant market maker in Mountaintop securities. It was also fully disclosed that Mountaintop was a newly formed company with no earnings. The Initial Public Offering was made as a high-risk security to qualified buyers.

The express ruling of the District of Columbia and

the S.E.C. was not that Global's activities were hidden, and therefore deceptive, but that they were improperly motivated. But, that is simply not the test. Impure, or even optimistic thoughts (that Mountaintop would succeed and the stock would increase in value) do not turn disclosed conduct into fraud. The entire basis of the S.E.C.'s opinion finding the bids were non-bona fide was its unsubstantiated belief that the Mountaintop securities had been "manipulated" by purchases and sales at artificially high prices by Global as the dominant market maker. There are far too many ambiguities, uncertainties, and assumptions about undefined "artificially high" bids in this case. The current state of the law does not adequately address these issues.

The S.E.C. would dismiss the thesis of Fischel & Ross that Petitioners have argued to this Court and to the District of Columbia:

> As the title of Fischel & Ross's article indicates, however, their argument addresses what they believe the law *should be*, not what it is. ... Moreover, other commentators have disagreed with the premises underlying Fischel & Ross's arguments. ...

Brief in Opposition, p. 12 FN 4.

This is precisely why this Court should grant certiorari. The Court of Appeals of District Columbia ruled manipulation

was proven because of "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose." *Michael J. Markowski and Joseph P. Riccio v. S.E.C.*, 274 F.3d 525, 529 (D.C. Cir. 2001) (App. C-5).

Petitioners contend this ruling conflicts with existing Supreme Court decisions. The S.E.C. is seeking to conclusively uphold the charges of manipulation and of non-bona fide bids based upon the circular and undefined assumption that the bids were artificially high.

Respectfully submitted,

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